

New court ruling on fitness-to-drive issue will likely carry "considerable weight" across country

Karen Capen

Since publication of a recent Case File column on the potential liability of physicians regarding their statutory duty to report unfit drivers (*Can Med Assoc J* 1994; 150: 988-990), two other Ontario physicians have been found liable to the victims of a motor-vehicle accident for failing to report a patient under s.177 of the Highway Traffic Act.

The Ontario Court of Appeal confirmed in *Toms v. Foster* that Dr. William A. Matheson, the family physician of defendant John Foster, and consulting neurologist Dr. Michael H. Kronby each were negligent — 20% and 10% respectively — for failing to meet their duty to report their patient.

At the time of the accident in 1983, Foster was 72 and had recently been found to have cervical spondylosis. The accident occurred when he made a left turn from the road into a driveway and struck a motorcycle, injuring the driver, Mark Toms, and his passenger, Gisèle Côté. Toms suffered a severe leg injury, while Côté received a closed head injury.

During the trial, evidence showed that Foster had visited his family physician in 1981 because of numbness in his hands and difficulties he was experiencing walking. Matheson referred his patient to Kronby, who diagnosed cervical spondylosis and advised him that it was not safe to drive. The family physician was informed in writing, both of the diagnosis and the caution given to Foster against driving.

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Neither doctor filed a report with the Ministry of Transportation.

Matheson testified that he believed the condition to be temporary and that his patient could be relied on to follow the warning given him against driving. A little over a year later, Matheson, after examining Foster and deciding his condition had improved, told his patient that he could drive again. A year after that, the accident happened.

The question about the physicians' negligence was put to the jury this way:

- Did any aspect of the medical condition of John Foster cause or contribute to the motor-vehicle accident? Answer: Yes.

- Did Kronby and Matheson owe a duty of care to the plaintiffs? Yes.

- Was Matheson negligent in failing to report John Foster to the Ministry of Transportation and Communications in May/June of 1981? Yes.

- Was Kronby negligent in failing to report John Foster to the Ministry of Transportation and Communications in May of 1981? Yes.

- If either Dr. Matheson or Dr. Kronby was negligent, did the negligence cause or contribute to the motor-vehicle accident? Yes.

Liability was apportioned among the three defendants and the plaintiff motorcycle driver. Damage awards for pain and suffering, future care costs and loss of income totalled \$429 800 for Toms and \$502 800 for Côté.

The statutory provision in Ontario requires that every legally qualified medical practitioner *shall* report to the registrar any person who, in the

practitioner's opinion, is suffering from a condition that *may* make it dangerous to operate a motor vehicle.

In their appeal, the physicians argued that, according to the statute, the obligation to report is not mandatory but a matter of discretion for the doctor. That meant, in this case, that Foster could be trusted to take the advice of his physician. Neither the Court of Appeal nor the jury in the lower-court trial accepted this interpretation, which was termed an "excuse" by the court.

It was also argued, based on evidence of medical experts, that it was not the practice to report all incidents, and that somehow medical practice would take precedence over the statutory requirement. This was rejected as well: "We . . . think it is clear that the duty of doctors to report is a duty owed to members of the public and not just to the patient. It is clearly designed to protect not only the patient but people he might harm if permitted to drive."

Physicians should be aware that this decision will likely carry considerable weight in Ontario and other parts of the country. It represents a new route for accident victims to pursue when damages exceed the immediate parties' available insurance coverage. Standards, as set out in notices from provincial colleges or boards and in the CMA's *Physicians' Guide to Driver Examination*, are important tools in meeting this onerous duty.

Physicians are also advised that there may be similar requirements for pilots; the CMA has published a guide, *Fit for Flying?*, to deal with this issue. ■